No. 10-1330

In the Supreme Court of the United States

KENNEDY JONES, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Petitioner brought suit under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e *et seq.*, to challenge an order of the Federal Aviation Administration denying him authorization to issue airworthiness certifications.

The question presented is whether the Federal Aviation Act, which gives the courts of appeals exclusive jurisdiction to review orders related to "to aviation duties and powers designated to be carried out by the Administrator," 49 U.S.C. 46110(a), deprived the district court in this case of jurisdiction over petitioner's Title VII claims.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 625 F.3d 827. The order of the district court (Pet. App. 8a-18a) is reported at 667 F. Supp. 2d 714.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 2010. A petition for rehearing was denied on January 26, 2011 (Pet. App. 21a-22a). The petition for a writ of certiorari was filed on April 26, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Aviation Act grants to the Administrator of the Federal Aviation Administration (FAA) the

authority to issue certificates related to air safety and navigation. 49 U.S.C. 44702(a). It also allows the Administrator to delegate "to a qualified private person" the authority to issue such certificates or to perform the tests, examinations, and inspections necessary to their issuance. 49 U.S.C. 44702(d)(1)(A)-(B).

Pursuant to this statutory authority, the Administrator has created the Designated Engineering Representative (DER) program. See 14 C.F.R. 183.29.[1] DERs are designees of the Administrator empowered to "perform examinations, inspections, and witness tests in the * * * engineering area[]." FAA Order 8100.8C § 300 (2010).[2] The FAA has stated explicitly that DERs, "while acting pursuant to their appointment, are representatives of the Administrator for specified functions and ARE NOT considered employees of the FAA." *Id.* § 300(f). Although DERs are certified by the FAA, they are independent contractors hired by the private aircraft industry to inspect private airplanes. See Pet. App. 2a. DERs are authorized to perform only the tests and inspections for which they are certified (their "authorized areas"). See FAA Order 8100.8C §§ 306, 309. They may not be delegated the authority to perform any "inherently governmental functions" such as approving "departures from specific policy and guidance, new/unproven technologies, equivalent level of safety findings, special conditions, or exemptions." *Id.* § 300(c).

Designees are selected from among qualified applicants by the Manager of the Aircraft Certification Of-

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[1] The DER program is only one of many "air designee" programs. As of 2008, the Administrator relied on approximately 11,000 designees to perform a variety of functions.

[2] FAA Order 8100.8C, http://www.faa.gov/documentLibrary/media/Order/8100.8C%20CHG%201-6.pdf (May 31, 2011).

fice, 14 C.F.R. 183.11(c)(1), pursuant to procedures and criteria spelled out in FAA Order 8100.8C. DER applicants must submit an application package demonstrating that they are qualified for the position, including that they meet four sets of appointment criteria: "regulatory" criteria, "technical" criteria, "interface" criteria (including the requirement of "integrity, professionalism, and sound judgment"), and "standardization" criteria. FAA Order 8100.8C § 401, Tbls. 4-1 through 4-4. Complete applications are reviewed by the Appointing Office Manager, who determines whether the applicant would be an asset to the office, and whether the agency has the need for and ability to manage the DER appointment. Gov't C.A. R.E. 23 (Harrison Decl. ¶ 6). If the Manager is satisfied that those conditions are met, the application is reviewed by an Advisor who makes a preliminary recommendation on whether to grant or deny the DER application. *Id.* at 23-24 (Harrison Decl. ¶ 7).

In reviewing an application, the Advisor examines whether the DER applicant meets all relevant criteria; has had direct interaction with the FAA; and has provided verifiable documentation. Gov't C.A. R.E. 23-24 (Harrison Decl. ¶ 7); FAA Order 8100.8C § 401(c). The Advisor also makes a determination about whether the FAA has the need for and ability to manage the DER. *Ibid.* If the Advisor recommends approval of the application, the Appointing Office Manager convenes an Evaluation Panel to further review the application. Gov't C.A. R.E. 23-24 (Harrison Decl. ¶ 7). If the Advisor recommends denial of the application, the application is instead returned to the Appointing Office Manager to review the justification for the denial. *Ibid.*; FAA Order 8100.8C § 502(b).

If a DER application is denied, the applicant may appeal that decision to an administrative Appeal Panel. FAA Order 8100.8C §§ 600-601. The Appeal Panel must consider all available information and may interview the applicant or FAA personnel, or may invite other persons to be resources at its deliberations. *Id.* § 601. The panel may decide to "[s]upport the original decision"; "[o]verride the original decision"; or "[d]irect a repeat of any part of the appointment process." *Id.* § 602. Its decision represents the final decision of the agency. *Id.* § 601. An order from the Appeal Panel qualifies as a final decision of the Administrator. *Ibid.*

The Aviation Act authorizes direct review in the federal courts of appeals of all final decisions of the Administrator with respect to aviation duties and powers. 49 U.S.C. 46110(a) (providing that any "person disclosing a substantial interest in an order issued by * * * the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator * * * may apply for review of the order by filing a petition for review in" the D.C. Circuit or the regional court of appeals within 60 days of the order); see 14 C.F.R. 13.235. The appellate court "has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order," and must defer to the Administrator's findings of fact, which, "if supported by substantial evidence, are conclusive." 49 U.S.C. 46110(c).

2. Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e *et seq.*, prohibits employment discrimination in the federal workplace based on race, color, religion, sex, or national origin. As applied to the federal government, Title VII protects "employees or applicants for employment" in specified agencies. 42

U.S.C. 2000e-16(a). It does not cover individuals who are not federal employees or who are not attempting to become federal employees.

3. Section 1981 of Title 42 of the United States Code provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to * * * the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." 42 U.S.C. 1981(a). The statute protects such rights "against impairment by nongovernmental discrimination and impairment under color of State law." 42 U.S.C. 1981(c).

4. a. Petitioner was employed by the FAA from 2001 until 2007, when he left the agency as part of a settlement of previously filed race-discrimination charges. Pet. App. 44a; see Pet. 2. Shortly after he left the FAA, petitioner applied to be certified as a DER. Pet. App. 11a; Gov't C.A. R.E. 25 (Harrison Decl. ¶ 9.a). As required by FAA procedures, the Appointing Office Manager, Charles Harrison, reviewed petitioner's application and determined that he would "not be an asset" to the office as a designee. *Ibid.* (Harrison Decl. ¶ 9.c); *id.* at 27 (Tracking Document). Harrison sent petitioner a letter advising him that his application had been denied and explaining the basis for that decision. *Id.* at 25 (Harrison Decl. ¶ 9.d).

The letter to petitioner stated that he had failed to meet the appointment criteria set forth in FAA Order 8100.8C—specifically, the requirement that he "possess a high degree of integrity, sound judgment, and a cooperative attitude." Gov't C.A. R.E. 31. The letter provided five specific examples calling petitioner's integrity and judgment into question: (1) a 2006 incident in which petitioner submitted his resume to a company for which

he had FAA oversight responsibility; (2) a separate 2006 incident in which petitioner asked a departing supervisor to remove a suspension from his personnel file, which the supervisor refused to do in part because petitioner had "an integrity problem"; (3) a 2007 incident in which officials at the FAA academy requested that petitioner not return as a trainer because of his poor performance and lack of professionalism during a prior course; (4) a 2007 incident in which petitioner inappropriately used his government credit card for personal reasons; and (5) information that petitioner had been distributing business cards to private industry indicating that he had already obtained the DER certification for which he was applying. *Id.* at 31-32, 40 (sample business card).

b. Petitioner filed a timely administrative appeal of the denial of his DER application, requesting "a thorough review of the process conducted in making this adverse decision and that the decision be reversed and [he] be appointed a FAA DER." Gov't C.A. R.E. 25, 33. Petitioner further requested that his application be submitted to the Advisor and then an Evaluation Panel, and that specific individuals be excluded from any further decisions regarding his DER application because he had previously named them in discrimination complaints filed against the agency. *Id.* at 33. Finally, petitioner asked to appear before the panel, to call witnesses, and to make arguments. *Ibid.* At the Appeal Panel's request, petitioner submitted an additional letter detailing the issues he intended to raise if called before the Appeal Panel. *Id.* at 35-37. Although the letter notes that petitioner believed he would be the first African-American engineer to be appointed a DER in the region, he did not allege that he was denied the certification either

because of his race or in retaliation for his prior charges of race discrimination. See *id.* at 36 (¶ 9).

The Appeal Panel upheld the denial of petitioner's DER application. The panel's decision letter noted that petitioner had failed to adequately respond to the primary bases for denial of his application, *i.e.*, that he lacked "a high degree of integrity, sound judgement, and cooperative attitude." Gov't C.A. R.E. 38. Although petitioner's appeal letter "briefly addressed" his cooperative attitude, he provided no information to rebut the conclusion that he lacked integrity or sound judgment. *Ibid.* The letter explained that "it is imperative that [DERs] possess a high degree of integrity and sound judgment" because of "the safety critical work" that DERs perform. *Ibid.* The Appeal Panel also rejected petitioner's contention that the process the FAA used to evaluate his application was improper, concluding that it "was appropriate concerning the circumstances." *Ibid.* The Panel found that the Manager appropriately "made a determination, based upon experience, that [petitioner] would not be an asset" to the office, and was therefore justified in denying the application without forwarding it to the Advisor. *Ibid.* Finding "no evidence to justify overturning the supervisor's finding that [petitioner did] not possess the high degree of integrity and sound judgment required to be an FAA DER," the Appeal Panel issued a final decision affirming denial of petitioner's DER application. *Id.* at 39; see Pet. App. 11a-12a.

c. Petitioner opted not to file a petition for review in the court of appeals pursuant to 49 U.S.C. 46110. Instead, five months after the decision, petitioner filed suit in district court under Title VII and 42 U.S.C. 1981. Pet. App. 2a, 12a. Petitioner alleged that, by denying

his application to be certified as a DER, the Secretary of Transportation (Secretary) violated Title VII by discriminating against him based on race, and by retaliating against him for previous charges of discrimination he filed while employed by the FAA. *Id.* at 44a-48a. He also alleged that the denial of his DER application violated 42 U.S.C. 1981. Pet. App. 2a, 12a.

The government moved to dismiss petitioner's complaint for lack of subject matter jurisdiction and failure to state a claim, and, alternatively, for summary judgment. Pet. App. 9a. The district court granted the government's motion to dismiss, concluding that petitioner's suit constituted "an impermissible collateral attack on the FAA's order denying his application for a DER appointment." *Id.* at 13a. The court held that it lacked jurisdiction to review the FAA's order because the Aviation Act gives appellate courts "exclusive jurisdiction to review FAA orders." *Id.* at 14a. The court relied on several courts of appeals decisions refusing to consider constitutional tort claims under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that were "'inescapably intertwined' with a review of the procedures and merits" of FAA orders appealable under Section 46110. Pet. App. 14a-15a (citing, *e.g.*, *Merritt* v. *Shuttle, Inc.*, 187 F.3d 263 (2d Cir. 1999) (*Merritt I*); *Tur* v. *FAA*, 104 F.3d 290 (9th Cir. 1997); *Green* v. *Brantley*, 981 F.2d 514 (11th Cir. 1993)). The court also noted that it would likely "grant * * * summary judgment as to all of [petitioner's] claims and causes of action, were the court to determine it holds jurisdiction over those claims." *Id.* at 17a.

d. Petitioner appealed. On appeal, the government withdrew reliance on the jurisdictional argument. In its brief, the government argued that this Court and the

court of appeals had long established that Title VII "'provides the exclusive judicial remedy for claims of discrimination in federal employment'" and "entitles a federal employee to *de novo* review of discrimination claims by a trier of fact." Gov't C.A. Br. 21 (quoting *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 835 (1976), and citing *Chandler* v. *Roudebush*, 425 U.S. 840, 864 (1976)). The government argued that this position was consistent with the Fifth Circuit's precedents, including cases in which the court had declined to extend the judicially created *Bivens* remedy to cases challenging FAA aviation orders. *Id.* at 25-26. The government explained that the logic of *Bivens* cases does not control when a plaintiff files suit under Title VII because in Title VII cases Congress has expressly authorized an exclusive cause of action to remedy the alleged discrimination. *Ibid.*

Although the government acknowledged that it had "modified" its "prior view on subject matter jurisdiction," it argued the change was a "narrow" one that did not require a reversal or remand. Gov't C.A. Br. 22. The government argued that the district court's dismissal of petitioner's Section 1981 claim could be affirmed on the alternative ground that that provision does not provide a remedy against the United States. *Id.* at 40-42. The government further argued that the court's dismissal of petitioner's Title VII race discrimination claim could be affirmed on the alternative ground that, because DERs are not employees of the FAA, neither DERs nor individuals applying for certification as DERs are covered by Title VII. *Id.* at 27-30. In addition, the government argued that petitioner's post-employment retaliation claim could be resolved on the alternative ground that the Secretary had legitimate non-

retaliatory reasons for denying petitioner's DER application. *Id.* at 30-40.

The government also noted that, even if petitioner were to succeed on any of his claims, the district court could award only limited relief. Gov't C.A. Br. 23-25. As the government explained, the Aviation Act gives courts of appeals "*exclusive* jurisdiction to affirm, amend, modify, or set aside any part of the order" at issue. *Id.* at 23 (quoting 49 U.S.C. 46110(c)). As a result, a district court would be powerless to modify or reverse an FAA order that was challenged in a discrimination case; if a court found that discrimination had occurred, it could only afford a plaintiff limited relief, such as an order requiring the FAA to consider a new DER application in a discrimination-free process.

e. Notwithstanding the government's submission, the court of appeals affirmed the district court's dismissal for lack of jurisdiction. Pet. App. 3a-5a. The court found that this case was controlled by its recent decision in *Ligon* v. *LaHood*, 614 F.3d 150 (5th Cir. 2010), petition for cert. pending, No. 10-1185 (filed Jan. 12, 2011), which held that the district court lacked jurisdiction over an age discrimination claim by a DER who wished to challenge the Administrator's decision to revoke some of his areas of delegated authority. As in *Ligon*, the court here found that petitioner's discrimination suit was "'inescapably intertwined' with a challenge to the procedures and merits" of a final order of the Administrator—an order that is reviewable only under the Aviation Act. Pet. App. 4a. Resolving petitioner's claims would "necessarily require[] a review and balancing of the same evidence that the FAA had weighed" in reaching the challenged decision. *Id.* at 5a.

DISCUSSION

Petitioner challenges the court of appeals' holding that the Aviation Act, 49 U.S.C. 46110(a), divests the district court of jurisdiction over petitioner's claim under Title VII. Although the government agrees with petitioner that the court of appeals' jurisdictional holding was incorrect, review of that decision is not warranted in this case, both because the court of appeals' decision does not conflict with any decision of any other court of appeals and because a contrary jurisdictional ruling would not affect the outcome of this case.

1. As the government explained in its brief in the court of appeals, the district court had subject matter jurisdiction over petitioner's discrimination and retaliation claims. This Court has held that the anti-discrimination provision of Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment," *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 835 (1976), and entitles a federal employee to de novo review of discrimination claims by a trier of fact, *Chandler* v. *Roudebush*, 425 U.S. 840, 864 (1976). The Aviation Act provides that a person seeking review of most final FAA orders may seek review only in the federal courts of appeals. 49 U.S.C. 46110(a). Such review is not a substitute for Title VII and does not preclude a proper Title VII plaintiff from pursuing his claims of employment discrimination. When a DER applicant files a petition for review under the Aviation Act, a court of appeals reviews the administrative record concerning the certification application process. Unless an applicant raised his discrimination or retaliation claim in his administrative appeal, such a claim cannot be adjudicated in an action under the Aviation Act seeking review in the court of appeals of the challenged agency action.

See 49 U.S.C. 46110(d) (limiting appellate review to only those issues raised in the administrative proceeding). Moreover, under the plain language of the Aviation Act and long-settled principles of administrative law, appellate courts may not conduct de novo review of an order denying a DER certification. Rather, the Administrator's factual findings must be affirmed if supported by substantial evidence, 49 U.S.C. 46110(c), and the agency's ultimate determination must be upheld unless it was arbitrary or capricious.[3]

The Fifth Circuit in *Ligon* v. *LaHood*, 614 F.3d 150 (2010), petition for cert. pending, No. 10-1185 (filed Jan. 12, 2011), erred in relying on cases holding that courts should not provide a remedy under *Bivens* for individuals seeking to challenge FAA orders that are otherwise reviewable in the courts of appeals pursuant to 49 U.S.C. 46110(a). 614 F.3d at 155-156. The courts in those cases adhered to this Court's admonition that *Bivens* should not be extended into a new context when there are "special factors counselling hesitation in the absence of affirmative action by Congress." *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988). Here, the availability of the administrative appeal process and judicial review under the Aviation Act presents ample reason to hesitate before creating a new judicially inferred cause of action. By contrast to *Bivens*, Title VII creates an express—and

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[3] Although the Aviation Act is silent on the standard of review applicable to non-factual findings, the courts of appeals have applied the Administrative Procedure Act's deferential standard of review, see 5 U.S.C. 706, to such determinations. See, *e.g.*, *City of Santa Monica* v. *FAA*, 631 F.3d 550, 554 (D.C. Cir. 2011), *City of Pittsfield* v. *EPA*, 614 F.3d 7, 14 (1st Cir. 2010); *Menard* v. *FAA*, 548 F.3d 353, 357 (5th Cir. 2008); *Flamingo Express, Inc* v. *FAA*, 536 F.3d 561, 567 (6th Cir. 2008); *Newton* v. *FAA*, 457 F.3d 1133, 1136 (10th Cir. 2006).

exclusive, see *Brown*, 425 U.S. at 835— cause of action for discrimination claims alleged by federal employees.

2. Although the court of appeals erred in concluding the district court lacked jurisdiction, this Court's intervention is not warranted in this case, both because the court's decision does not squarely conflict with the decisions of other courts of appeals and because a contrary ruling on the jurisdictional question would have no effect on the outcome of this case.

a. First, contrary to petitioner's assertion (Pet. 6-7), there is no division among the courts of appeals about the question presented that would warrant this Court's intervention in this case.

Petitioner relies on the D.C. Circuit's decision in *Battle* v. *FAA*, 393 F.3d 1330 (2005), which, he argues (Pet. 6), held that "reinstatement and back-pay claims for race and disability discrimination—including those under Title VII—are not the kinds of claims that invoke the exclusive-jurisdiction provision of § 46110." That is incorrect. The plaintiff in *Battle* filed suit in federal district court challenging the FAA's decision to terminate an arbitration process regarding discrimination claims plaintiff had brought against the FAA. 393 F.3d at 1332-1333. In concluding that the district court had jurisdiction over the plaintiff's claims, the court of appeals held that the decision being challenged—the decision to terminate the arbitration process—was not "an order issued by * * * the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator" and was not, therefore, governed by Section 46110. *Id.* at 1334. In this case, in contrast, there is no question that the order denying petitioner's application to be certified as a DER is governed by Section 46110.

See Pet. App. 4a. Although the government agrees that the district court had jurisdiction over petitioner's claims, the court of appeals' holding to the contrary does not conflict with the D.C. Circuit's decision in *Battle*.

Petitioner also relies (Pet. 6-7) on two court of appeals cases involving suits under the Federal Tort Claims Act, rather than claims of employment discrimination. In both *Merritt* v. *Shuttle, Inc.*, 245 F.3d 182 (2d Cir. 2001) (*Merritt II*), and *Beins* v. *United States*, 695 F.2d 591 (D.C. Cir. 1982), the courts of appeals held that the district courts had jurisdiction over the allegations of tortious conduct because such allegations were not intertwined with any FAA order reviewable under the Aviation Act. See *Merritt II*, 245 F.3d at 189-190 ("Merritt's FTCA claim does not allege that he was injured or aggrieved by the * * * order suspending his pilot's certificate," but rather "that he was injured by the failure of FAA employees to provide him with accurate weather information prior to takeoff."); *Beins*, 695 F.2d at 598 n.11 (an appeal of an FAA order under the Aviation Act "would not have led to review of the negligence issue before the district court").

The Second Circuit employed similar reasoning in *Cook* v. *Pan American World Airways, Inc.*, 771 F.2d 635, 642 (1985), abrogated on other grounds by *Lorance* v. *AT&T Technologies, Inc.*, 490 U.S. 900 (1989) (see Pet. 7), in concluding that a district court had jurisdiction over an Age Discrimination in Employment Act (ADEA) ADEA suit relating to a final FAA order that was reviewable directly in the courts of appeals pursuant to Section 46110. That court concluded that district courts had jurisdiction over airline employees' ADEA claims challenging a seniority list that was created as part of an airline merger and approved by the FAA's

Civil Aeronautics Board (CAB), even though the CAB's approval of the list also could have been appealed to the circuit court under the Aviation Act. To the extent the issue in *Cook* overlaps with the issue in this case, the two courts of appeals applied consistent reasoning. In *Cook*, the Second Circuit found that the district court had jurisdiction over the ADEA claims because the administrative agency was not authorized to decide the issues raised in the separate ADEA action. 771 F.2d at 641-642. The court therefore concluded that the ADEA claims did not constitute a "collateral attack" on the CAB's approval of the seniority list. *Id* at 643.

The court of appeals in this case held that the district court did not have jurisdiction over petitioner's Title VII claims because they were "inescapably intertwined" with the merits of the agency's final action denying petitioner's application to be certified as a DER. Pet. App. 4a. The court relied on its recent decision in *Ligon*, in which it had also held that, to the extent a plaintiff in petitioner's position raises a claim that "could not have been raised in a challenge to a particular order," a district court would have jurisdiction to consider it. See *Ligon*, 614 F.3d at 157 n.2; see also Pet. App. 16a n.6 (district court's conclusion that, to the extent petitioner's allegations are not inescapably intertwined with the agency's decision on his DER application, "those allegations fail to rise to the level of an adverse employment action necessary" to state a claim of discrimination or retaliation under Title VII). That decision creates no conflict with the decisions of other courts of appeals that would warrant this Court's review.[4]

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[4] Petitioner also relies (Pet. 6) on the district court's decision in *Breen* v. *Peters*, 474 F. Supp. 2d 1 (D.D.C. 2007). The district court in that case stated that "[c]ertain FAA administrative orders are review-

Moreover, the question whether district courts have jurisdiction over employment discrimination claims brought by FAA designees is unlikely to arise with any significant frequency. As discussed at pp. 17-18, *infra*, most such suits are subject to dismissal for failure to state a claim because designees are neither "employees" of nor "applicants for employment" with the FAA.[5] It is not clear in any event why an FAA designee would pursue such a claim under the ADEA or Title VII, since the only remedies available to him are equally available under the Aviation Act. The Aviation Act gives the courts of appeals "exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order" challenged. 49 U.S.C. 46110(c). A district court therefore cannot order the FAA to grant a disappointed applicant the primary relief he is likely to seek—DER authority. See *Ligon*, 614 F.3d at 157 ("[T]he relief Ligon seeks—reinstatement of his areas of authority—cannot be granted by a district court reviewing an ADEA claim."). Nor could a court award a DER applicant backpay, because air designees are either independent contractors or full-time private employees, and in either instance are paid directly by a private-sector entity. *Id.* at 152. The only

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able only by the court of appeals," and that "claims that are '"inescapably intertwined" with review of such orders' do not fall within a district court's jurisdiction." *Id.* at 4 (citations omitted). The district court concluded that the ADEA claim of the FAA employee in that case was not inescapably intertwined with the FAA's decision to outsource certain flight service activities to private entities in part because the employee did not have an opportunity to raise an age discrimination claim in his administrative appeal. *Id.* at 6. That reasoning is consistent with the court of appeals' reasoning in this case.

[5] In some cases, an applicant who is a former FAA employee may be able to state a post-employment retaliation claim under the ADEA or Title VII. See, *e.g.*, *Robinson* v. *Shell Oil Co.*, 519 U.S. 337 (1997).

types of relief a DER applicant could obtain in a Title VII suit would be a finding of discrimination, an order requiring the FAA to consider a new DER application in a discrimination-free process, and possibly attorney's fees under the Equal Access to Justice Act.

b. This case would not be a suitable candidate for review in any event, since, as the district court indicated in its decision (Pet. App. 17a), petitioner's Title VII and Section 1981 claims all fail for independent reasons.

Petitioner's discrimination claim under Title VII fails because DERs are not employees of the FAA; DERs and applicants to become DERs and are not, therefore, covered by Title VII. DERs are skilled independent contractors who, "while acting pursuant to their appointment, are representatives of the Administrator for specified functions and ARE NOT considered employees of the FAA." FAA Order 8100.8C § 300(f). DERs are not permitted to perform certain "inherently governmental functions" that "cannot be delegated to a designee." *Id.* § 300(c). Moreover, the FAA does not set DERs' work schedules, does not actively supervise the work performed by DERs, and does not provide them with any equipment or office space. See Gov't C.A. Br. 29. Designees collect no salary or benefits from the FAA. Gov't C.A. Br. 29. Instead, they are paid by private aviation companies. *Ibid.* In fact, some DERs are full-time employees of private companies. *Ibid.*; FAA Order 8100.8C § 307 (discussing "Company DER" certification). And if a current FAA employee wishes to become a designee, he must resign from the FAA before obtaining DER certification. *Id.* § 402.

Petitioner's Title VII post-employment retaliation claim fares no better. Even assuming that petitioner could make out a prima facie case of post-employment

retaliation under Title VII, cf. *Robinson* v. *Shell Oil Co.*, 519 U.S. 337 (1997), his claim would fail because no reasonable fact finder could conclude that the Administrator's stated reasons for denying the application were pretextual. The FAA explained that it denied petitioner's DER application in light of five specific events demonstrating that he did not "possess a high degree of integrity, sound judgment, and a cooperative attitude": (1) while an FAA employee, petitioner submitted a resume to a company for which he had FAA oversight responsibility; (2) petitioner requested that a prior manager remove disciplinary actions from petitioner's file; (3) petitioner performed poorly as a trainer at the FAA Academy, leading to a request that he not return as an instructor; (4) petitioner misused his government credit card; and (5) petitioner circulated business cards that falsely indicated he had already been certified as a DER. Gov't C.A. R.E. 31-32. Each stated reason provides a sufficient and independent basis for concluding that petitioner lacked the integrity and judgment necessary to become a DER. See FAA Order 8100.8C § 401(c) ("[f]ailure to meet the applicable criteria will result in a denial" of the application).

Petitioner has never disputed the accuracy of any of the reasons given for denial of his application. He argues instead that the FAA failed to follow its own procedures (Pet. 2), and that some of the information referenced above should have been "expunged" from his personnel record under a settlement he reached with the agency (Pet. 3). He is incorrect.[6] In any case, even if

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[6] The Appeal Panel expressly rejected petitioner's challenge to the procedures employed by the FAA, correctly concluding that the procedures were "appropriate concerning the circumstances." Gov't C.A. R.E. 38. Equally unavailing is petitioner's argument (Pet. 3) that the

the FAA were forbidden from considering petitioner's conduct while an FAA employee, it would still be permitted to take note of the fact that, at the time of his DER application, he was circulating business cards that falsely indicated that he had already received a DER certification. Gov't C.A. R.E. 40 (sample business card). Such a misrepresentation alone would provide sufficient grounds for the Administrator's conclusion that petitioner lacked the requisite integrity and judgment to become a safety designee. See FAA Order 8100.8C § 400(a) ("Any false statements made by the applicant in the application package are grounds for denial of appointment.").

Finally, although petitioner's question presented focuses specifically on his Title VII claims (see Pet. i), his Section 1981 claim also lacks merit. That statute protects petitioner's rights only "against impairment by *nongovernmental* discrimination and impairment under color of *State* law." 42 U.S.C. 1981(c) (emphases added). Every court of appeals to consider the question has held that Section 1981 does not reach discrimination (such as

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terms of his prior settlement forbid the FAA from considering his poor performance as an employee in determining whether to certify him as a designee of the Administrator. The settlement agreement merely required the FAA to "remove from [petitioner's] O[fficial] P[ersonnel] F[older] any documentation regarding any disciplinary action (including, but not limited to, any suspension or letter(s) of reprimand) which might currently exist in his OPF." Gov't C.A. R.E. 28. By its plain terms, this agreement was limited to documentation in petitioner's OPF; it did not extend to other file systems, such as the Employee Performance File (EPF) accessed by the Appointing Office Manager reviewing petitioner's DER application. *Id.* at 26 (Harrison Decl. ¶10). By regulation, the EPF and OPF are distinct systems, see 5 C.F.R. 293.402, and the FAA did not agree to expunge records from that separate EPF system.

is alleged here) perpetrated under color of federal law. See, *e.g.*, *Dotson* v. *Griesa*, 398 F.3d 156, 162 (2d Cir. 2005); *Davis-Warren Auctioneers* v. *FDIC*, 215 F.3d 1159, 1161 (10th Cir. 2000); *Davis* v. *DOJ*, 204 F.3d 723, 725 (7th Cir. 2000); *Lee* v. *Hughes*, 145 F.3d 1272, 1277 (11th Cir. 1998). Petitioner does not acknowledge those holdings or advance any plausible basis for asserting a Section 1981 claim against the Secretary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2011